SUPREME COURT, U. S.
FILED
NOV 25 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-371

NANETTE LEADING FIGHTER
AND DAVID LEADING FIGHTER,

PETITIONERS,

V.

THE COUNTY OF GREGORY,
A POLITICAL SUBDIVISION OF
THE STATE OF SOUTH DAKOTA,

RESPONDENT.

OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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ARGUMENT

I

THE DECISION OF THE SOUTH DAKOTA SUPREME COURT IS CORRECT UNDER FEDERAL STATUTORY LAW, AND IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

The Supreme Court of South Dakota decided that lands purchased by an Indian from funds obtained by the sale of allotted restricted lands were not restricted and were not exempt from taxation by the state. This decision is correct because there is no federal statute which creates the desired exemption.

Petitioners place primary reliance on 25 U.S.C. 409a. However, a reading of that statute shows that it is inapplicable. It is intended to provide for the substitution of new lands for allotted lands which are taken by a state or political subdivision for public improvement purposes or sold under existing state law. As is made clear by the legislative history, this section is

intended to apply to sales which are required by state law. For instance, the legislative history discussed condemnation for public purposes by a state, as was discussed by the majority opinion. See, Petition for Certiorari, opinion below, page 10. The phrase in section 409a "sold under existing law," deals not with a voluntary transaction, but with a sale required by law, such as a foreclosure. Clinkenbeard v. United States, 109 F. 2d 730 (10th Cir., 1940).

Section 409a was not intended to have the general applicability which petitioners urge. The type of general exemption for newly purchased lands on which petitioners would be able to rely is contained in 25 U.S.C. 412a. This section clearly provides that all agricultural or city property purchased out of trust or restricted funds of individual Indians shall be considered instrumentalities of the federal government

and shall be exempt from taxation. However, section 412a applies only to lands purchased at the time of its enactment, which was June 20, 1936. Thus, at that time, Congress legislated an exemption for previously purchased lands. No such exemption exists in the federal statutes for lands which are now purchased out of restricted funds.

In the proceedings before the Supreme Court of South Dakota, petitioners attempted to find an exemption such as that contained in section 412a which would currently be in force. Petitioners argued that such an exemption was contained in 25 U.S.C. 349, 464 and 465, and 409a. In the Petition for Certiorari, petitioners have abandoned the first two of these arguments, and focused their effort on section 409a. However, a reading of sections 409a and 412a reveal that section 409a was not intended to have the effect

petitioners urge, and that 412a clearly was intended to have this effect, but not prospectively. (Moreover, as the opinion below noted, the provisions of section 409a were not carried out and therefore any exemption which could have been created thereunder was lost.)

This Court has previously held that where a statute authorizes the Secretary of Interior to place restrictions on newly purchased lands, and where the secretary has enacted regulations providing for such restrictions, and where the secretary has followed the procedures outlined in such regulations, then newly purchased lands may be restricted and tax exempt. Sunderland v. United States, 266 U.S. 226 (1924). The Sunderland case was followed by the Tenth Circuit Court of Appeals in Ward v. United States, 139 F. 2d 79 (10th Cir., 1943). In Ward, it was held that lands purchased for use of a citizen of the Five Civilized

Tribes from restricted funds were to be restricted had the force and effect of law. If such a regulation were applicable to the present case, petitioners would be correct in arguing that federal statutory or regulatory law places the newly purchased lands in this case under restrictions against alienation and exemptions from taxation. However, just as there is no federal statute intended to accomplish this purpose, similarly there is no longer a federal regulation intended to place the land under restrictions and cause it to be tax exempt.

Congress has intended that lands purchased with funds obtained from the sale of restricted lands after June 20, 1936, the date of the enactment of what is now 25 U.S.C. 412a, are not tax exempt and restricted. The Secretary of the Interior provided by regulation that lands so purchased by a member of the Five Civilized

Tribes could be made tax exempt and restricted, but this regulation was repealed in 1973. 25 CFR 121.1 et seq. Thus Congress has made no provision for treatment of the land in question as trust land.

Because there is no federal law providing that petitioners' land shall be tax exempt, petitioners urge a common law doctrine as a basis for the tax exemption. As stated in the Ward case, this principle of the law of trusts provides that when there is a change of form of trust property but it remains capable of clear identification, it is not divested of its trust character. As we have noted above, the decision in the Ward case was based on a federal statute and a federal regulation that specifically provided that newly purchased property was to be tax exempt and restricted, as well as the fact that the deed to the new property contained a restrictive clause. Although the Court in

Ward noted that its holding was consistent with the trust principle stated, there is nothing in Ward which indicates that that trust principle could have been a basis for the holding in the absence of a federal regulation.

The principle of the law of trusts upon which petitioners rely is intended to provide for recovery of misappropriated funds by a beneficiary from a trustee who has wrongfully misappropriated trust property. Republic Supply Company of California v. Richfield Oil Company, 79 F. 2d 375 (9th Cir., 1935). This common law principle cannot operate to create a tax exemption.

If the land purchased by petitioners is tax exempt, it is because it is a federal instrumentality. If the land is a federal instrumentality, on the ground that it is held in trust for Indians, it must also be held subject to restrictions against alienation. 25 U.S.C. 412a. Thus,

the argument advanced by the petitioners requires that a common law principle of the law of trusts have the effect of creating a tax exemption and placing restrictions on petitioners' land. Thus, petitioners must argue not only that the federal government can exempt their land from taxation without a statute or regulation, but must also argue that the United States can restrict the alienation of their land without statutory authority to do so.

Petitioners attempt to further enhance the trust theory argument by citing Choate v. Trapp, 224 U.S. 665 (1912), to the effect that the right to a tax exemption is a vested right protected by the Fifth Amendment. However, this argument clearly begs the question. The fact that a tax exemption has the status of a vested right is only relevant after it is established that there is a tax exemption. As was made clear in the Choate case, the privilege "is annexed

by the terms which create it, to the land itself." 224 U.S., at 676. The exemption "is attached to the land only so long as the Indian retains the title." 224 U.S., at 677. The tax exemption ceased to exist when the petitioners and the federal government parted with the land. The fact that that exemption was a vested right is irrelevant to the question of whether newly acquired land is tax exempt.

In conclusion, the decision of the South Dakota Supreme Court was correct because there is no federal statute or regulation which provides that the land acquired by petitioners shall be tax exempt and restricted. Neither 25 U.S.C. 409a, nor 25 U.S.C. 464-465 were intended to exempt the petitioners' land from taxation. Moreover, 25 U.S.C. 412a makes it clear that Congress intended to exempt such lands purchased before 1939, but does not intend such an exemption for lands purchased

at this time. No common law doctrine can provide a substitute for this absence of statutory authority.

II

THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTIONS OF FEDERAL LAW.

Petitioners urge that 25 U.S.C. 409a or 25 U.S.C. 464-465 provide that their land shall be tax exempt. However, as noted above, 25 U.S.C. 412a and other statutes make it clear that land purchased under the circumstances of the present case is no longer to be tax exempt. Therefore, the operation of 25 U.S.C. 409a is not a question in this case.

The burden of proof in this case was never placed in issue in either the trial or the appeal below. The question of who must bear the burden of proof is not properly raised by this case.

The remaining question which petitioners list as a question raised by this

case is whether conversion of the form of an Indian trust asset by the trustee United States strips that trust asset of its trust character. This general question is also not raised by the present case. Instead, the present case deals only with whether lands purchased from the proceeds of allotted lands are tax exempt and restricted. This is a narrow question for which the federal statutes provide a clear answer. Petitioners assert that a "vestigial link to one's Indian heritage will be lost to Indians who elect to leave the Reservation if nontaxability cannot be guaranteed." Petition for Certiorari, page 20. It is said that "an Indian's ability to leave the reservation will be fostered" by decision in this case. However, nontaxability is not the only attribute of the land which this case involves. If the land is to be nontaxable as a federal instru-

mentality, it must also carry restrictions on alienation. 25 U.S.C. 412a; see Ward v. United States, 139 F. 2d 79 (10th Cir., 1943).

While nontaxability would be an advantage for Indians who leave the Reservation and acquire property, restrictions on alienation would be a hindrance. Presumably the net result would be a benefit to some Indians who leave the Reservation and a detriment to others.

Respectfully submitted,

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